

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4
5
6 UNITED STATES OF AMERICA

7
8 vs.

9
10 RYAN HARRIS

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12
13 *****

14 For Hearing Before:
15 Chief Judge Mark L. Wolf

16 Sentencing

17
18 United States District Court
19 District of Massachusetts (Boston.)
20 One Courthouse Way
21 Boston, Massachusetts 02210
22 Wednesday, June 27, 2012

23 *****

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1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Criminal Matter 09-10243, the
4 United States of America versus Ryan Harris. The Court
5 is in session. You may be seated.

6 THE COURT: Good afternoon. Would counsel
7 please identify themselves for the Court and for the
8 record.

9 MS. SEDKY: Good afternoon, your Honor. Mona
10 Sedky and Adam Bookbinder for the United States. I also
11 wanted to alert the Court that we have a representative
12 from Charter Communications.

13 THE COURT: I'm sorry. I can't hear you.

14 MS. SEDKY: I'm sorry. We have a
15 representative from one of the victims, Charter
16 Communications, and he would like to address the Court
17 whenever the Court would like to address him.

18 THE COURT: Yes, and, in fact, I was going to
19 ask you whether the notices were given and whether
20 anybody wanted that opportunity.

21 Okay. And for the defendant?

22 MR. MCGINTY: And, your Honor, for Mr. Harris,
23 Charles McGinty and Christine Demaso from the Federal
24 Defender Office. Good afternoon, your Honor.

25 THE COURT: Good afternoon. And Mr. Harris is

1 present.

2 Yesterday I issued two memoranda and orders
3 addressing the defendant's motions to acquit. I assume
4 the defendant and the government received those,
5 correct?

6 MR. MCGINTY: We did, your Honor.

7 MS. SEDKY: Yes.

8 THE COURT: And then you've implicitly
9 answered this, Ms. Sedky, but were the victims notified
10 of this proceeding?

11 MS. SEDKY: They were, your Honor. Two of
12 them submitted written submissions and one of those two
13 has come to appear in court, your Honor.

14 THE COURT: And the representative from
15 Charter would like to be heard at the appropriate time.
16 Essentially after I calculate the guidelines I will give
17 him an opportunity to be heard.

18 In connection with this I have a presentence
19 report as to which the defendant has made several
20 objections, the government's sentencing memo with some
21 attachments, the defendant's sentencing memo, the
22 government's response to the defendant's sentencing
23 memo, which includes letters from Charter, Motorola.

24 Is there anything else I should have received and
25 read?

1 MS. SEDKY: No, your Honor.

2 MR. MCGINTY: I think the only other matter,
3 your Honor, is there's a Pretrial Services release
4 status letter that is also part of the record.

5 THE COURT: Thank you. I have received that
6 letter, it's dated June 25, and it tells me that
7 Mr. Harris has been in compliance with the requirements
8 of his pretrial release.

9 MS. SEDKY: Your Honor, we do have one item
10 that we brought to court with us this morning, and I'm
11 showing it to defense counsel, and if I could approach
12 the Courtroom Deputy and hand him a copy, it's a
13 document that I'd like to reference in my oral
14 statements to the Court. It's a printout from
15 Mr. Harris's web page as of two days ago.

16 THE COURT: Um -- okay. You may give a copy
17 to the Clerk.

18 (Hands up.)

19 THE COURT: I'll make this Exhibit 1 with
20 today's date.

21 (Pause.)

22 THE COURT: All right. As always I'd like to
23 assure that we have a common sense of the operative
24 legal framework, it's succinctly stated by the Supreme
25 Court in **Gall**. I'm required to begin this sentencing

1 hearing by correctly calculating the applicable
2 guideline range. The guidelines must be the starting
3 point as an initial benchmark. However, I must consider
4 all of the Section 3553(a) sentencing factors to
5 determine what sentence is sufficient and no more than
6 necessary to serve the intended purpose of sentencing.
7 I may not presume that the guideline range is
8 reasonable. I have to determine the sentence based on
9 the unique facts of the case. If there's a departure or
10 a variance, a major departure or a variance requires a
11 more substantial justification than a minor one. And I
12 need to explain my decision.

13 Do the parties agree that's the applicable
14 framework?

15 MS. SEDKY: We do, your Honor.

16 MR. MCGINTY: We do, your Honor.

17 THE COURT: And we're operating under the
18 guidelines in the most current manual with the
19 amendments effective November 1, 2011.

20 Mr. McGinty, have you and Mr. Harris each read the
21 presentence report?

22 MR. MCGINTY: We have, your Honor.

23 THE COURT: And other than the matters raised
24 in your objections, is there anything that you or he
25 think is inaccurate?

1 MR. MCGINTY: No, your Honor.

2 THE COURT: All right.

3 And, Mr. Harris, did you read the presentence
4 report?

5 THE DEFENDANT: Yes, I have, your Honor.

6 THE COURT: And other than the objections
7 raised on your behalf by Mr. McGinty, is there anything
8 in there that you feel is inaccurate?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Okay. Then let's turn to those
11 objections.

12 All right. The first objection resulted in the
13 updating of the presentence report to reflect that Craig
14 Phillips has been sentenced to one year of probation.

15 The second objection is to Paragraphs 8 through 19
16 concerning the government's statement of the facts of
17 the case. Now, the statement seemed to me to be a
18 reliable summary of the evidence that the jury would
19 have found credible in convicting the defendant, so I'm
20 inclined to deny that objection.

21 But do you wish to be heard, Mr. McGinty?

22 MR. MCGINTY: No, your Honor. I just wanted
23 to have a formal objection.

24 THE COURT: Okay.

25 Objection 3 relates to the loss calculation.

1 Essentially, as I understand it, the Probation
2 Department, based on the information provided by the
3 government, calculated the guidelines based on a loss
4 figure of over 1 million and less than 2,500,000. That
5 was based on all of the revenue to TCNISO in certain
6 years. But if I read the sentencing memos right, um,
7 the parties recognize that some of that revenue might
8 not have been unlawful and there may have been some
9 associated expenses, too, and the parties agree that
10 it's too difficult, in this case, to reliably,
11 reasonably calculate the loss. So the gain, as
12 Probation did, ought to be used.

13 But the parties are of the view that the gain is
14 more accurately or appropriately deemed to be in the
15 400,000 to a million dollar range -- do I understand the
16 posture of this, for calculating the guideline range as
17 opposed to restitution?

18 MS. SEDKY: That's correct, your Honor.

19 MR. MCGINTY: And that is by agreement, your
20 Honor.

21 THE COURT: All right. Well, that does seem
22 to me to be most reasonable. The Probation Department
23 was acting on the information it had at the time, but,
24 um, you know, recognizing that some of the products sold
25 could be lawfully -- well, weren't part of the scheme

1 and that there would have been some expenses, um, I
2 agree both that for the reasons the parties stated in
3 their submissions, the loss cannot be reasonably
4 determined, and so under Section 2(b)(1.1) Application
5 Note 3(b), it's appropriate to use the gain, and
6 \$400,000 to a million is the most appropriate figure.

7 Okay. Is the restitution issue raised in a
8 separate objection or is it embedded in this one? I
9 think it may be embedded in this one.

10 MR. MCGINTY: It is embedded in that, your
11 Honor. We reached agreement -- and I don't recall
12 whether we reached agreement, um, after I filed the
13 objections, but we did reach an agreement as to --

14 THE COURT: Well, that's \$152,320?

15 MR. MCGINTY: Correct.

16 THE COURT: And what's the theory on that?

17 MS. SEDKY: Your Honor, the parties conferred
18 after the various submissions and, um, in light of the
19 analysis that Charter performed, coming up with a range
20 of approximately 304,000, I believe, to a high of
21 350,000-plus thousand based on -- depending on different
22 assumptions that were made, um, the parties got together
23 and decided that there were some assumptions in
24 Charter's number that we thought were arguably
25 aggressive and in the end there were some genuine

1 litigable issues about whether, for example, um, it was
2 fair to assume that every single purchaser of the TCNISO
3 product successfully used that product every day from
4 the date of purchase through October of 2010 when
5 Charter was able to find a technical fix. And we
6 thought that in light of those assumptions, that might
7 have been too aggressive, um, we thought -- the parties
8 got together and decided that a 50 percent number would
9 be a fair recommendation to the Court.

10 THE COURT: And, um, I don't know if Charter
11 wants to be heard on that. Do you know whether Charter
12 is content with that amount?

13 MS. SEDKY: Well, we did tell Charter in
14 advance of appearing here today and I'm happy to have,
15 um, her address that either now or later. I didn't hear
16 any push-back from her then, but we're open to it.

17 THE COURT: Who is the Charter
18 representative?

19 MS. SEDKY: Her name is Laurie Jill Wood and
20 she's in the second row.

21 THE COURT: And, Ms. Wood, I'm going to give
22 you a chance to speak more generally later, but is
23 Charter, which will be the recipient of any restitution
24 that's paid, wish to argue against or tell me something
25 that should cause me to find an amount of restitution

1 owed of more than that 152,000?

2 MS. WOOD: No, your Honor, we understand the
3 government's position.

4 THE COURT: All right. Thank you.

5 All right. So I've allowed Objection Number 3 and
6 said the gain is 400,000 to 1 million dollars and the
7 amount of restitution is \$152,320.

8 The fourth objection. The IRS summary included
9 "all revenues not simply monies for the sale of TCNISO
10 products."

11 Is that essentially moot at this point?

12 MR. MCGINTY: It is, your Honor.

13 THE COURT: Okay. I'm going to treat that
14 one, at this point, as withdrawn, but I will keep it in
15 mind.

16 Objection 5. It says: "Harris denies he retained
17 \$526,685." I think the government has the burden of
18 proving this. It doesn't affect the guideline range and
19 the amount of the gain is in the 400,000 to 1 million
20 dollar range, but, Ms. Sedky, do you want to speak to
21 this?

22 MS. SEDKY: My understanding is that because
23 it doesn't affect the guidelines range, I assume that
24 Mr. Harris is putting this in here in part out of a
25 concern for a potential IRS prosecution down the line.

1 Um, we stand by the number. We had an IRS agent do a
2 very comprehensive analysis of Mr. Harris's business
3 expenses versus revenues and if -- and when there is a
4 tax case, we can certainly discuss the merits there. I
5 don't think it bears taking up any of the Court's time
6 here because it's not relevant to the guidelines
7 calculation.

8 THE COURT: Well, I'd also have to determine
9 that it's not relevant to the sentence, including the
10 amount of restitution. But I'm prepared to assume that
11 the amount of the gain or the gain to Mr. Harris was
12 400,000 to a million, but whether it's precisely
13 \$526,685 is not going to influence the guideline range
14 or the sentence.

15 But do you want to be heard?

16 MR. MCGINTY: I do not, your Honor.

17 (Pause.)

18 THE COURT: All right. So with regard to
19 objection 5, I've written on the presentence report:
20 "The amount of the gain is 400,000 to 1 million dollars
21 to Harris and the precise amount does not affect the
22 guideline or the sentence." Objection 5, I've allowed.

23 So, in the circumstances, while I'll say that my
24 present intention is to give the same sentence
25 regardless of whether the guideline range is 87 to 108

1 months, as probation calculated, or 70 to 87 months, as
2 my rulings, I think, provide, um, the present guideline
3 range is a total offense level of 27, a criminal history
4 category of 1, 70 to 87 months in prison, therefore, 12
5 to 36 months supervised release. The fine range is
6 reduced to \$12,500 to 125,000. The amount of
7 restitution is \$152,370 -- actually, 320, I think,
8 dollars. And there's a \$700 special assessment.

9 Do the parties agree that those are the guideline
10 ranges?

11 MR. MCGINTY: We do, your Honor.

12 MS. SEDKY: Yes, we do.

13 THE COURT: All right. I think before I hear
14 from counsel and Mr. Harris, if he wishes to be heard,
15 that this would be the appropriate time to hear from the
16 representative of Charter. So if you would come up to
17 that podium, say your name for the record and for the
18 Court, and let me -- let us hear, but direct it to me,
19 what you would like to say.

20 MS. WOOD: Okay. Great. My name is Laurie
21 Jill Wood and, um, I am the Director of Security at
22 Charter Communications.

23 Okay. Um, well, um, there's a few things that I
24 wanted to touch on or reasons that I wanted to come here
25 today. Um, you know, I think that sometimes people

1 think of cable theft as just a small crime and
2 victimless crime that, you know, whether it's
3 downloading a song or plugging into an apartment
4 building, but in this particular case, while though we
5 can't determine exactly how much money was lost, it was
6 significant, and it was, um, across the industry. We
7 believe somewhere around 3 to 4 million dollars.

8 Another effect of this was that it affected our
9 paying and legitimate customers. We, as I mentioned in
10 my letter, we structure our network and site it based on
11 how many customers we have and if we have a certain
12 number of unexpected customers, then, um, our using up
13 the service, that degrades the service for our paying
14 customers as well.

15 I wanted to be here today also because this has
16 been an important part of my professional life. Um, I
17 started the Internet Security Department at Charter in
18 2001 as a 1-person department and, um, over the years,
19 as computer crimes have grown, we've expanded as well.
20 I know that as early as 2004 I was monitoring the TCNISO
21 site as were, um, some of the engineers in the field,
22 and I would regularly receive calls from them saying,
23 "Have you seen this site? TCU can buy a modem -- did
24 you see if he can say you want the Charter modem?" And
25 so this is something we've been fighting for quite a

1 while.

2 And I remember also that it was what -- I'm sure
3 that may have been other people -- or there may or may
4 not have been other people who developed and sold cloned
5 modems, but specifically I remember TCNISO as the
6 primary source because, um, I could never remember the
7 initials, so I regularly would Google "hacked modem" or
8 a "cloned modem" and there would pop up TCNISO.

9 We did finally, as I believe Benjamin testified,
10 um, during the trial, that our engineers kept working at
11 how could we get these modems distinguished and kicked
12 off the network? And they did come up with a way of
13 doing it that would identify all the duplicate modem
14 MACs across our network, but as I indicated earlier,
15 that the problem was that it didn't distinguish between
16 legitimate customers and illegitimate customers and, um,
17 rather than kick off a legitimate customer on the
18 network, we were limited in our resources and so we
19 decided to just let those folks be on the network until
20 we could figure out a better solution. And the
21 engineers kept working and kept working and, um,
22 eventually they did find a way of distinguishing between
23 the paying customer and the illegitimate customer, but
24 it took a while -- it took several years and a lot of
25 research.

1 The main reason I wanted to come today is that,
2 um, my role, since 2001, has been, um, to respond to law
3 enforcement. Charter has a law enforcement response
4 team that reports to me.

5 I'm sorry?

6 THE COURT: If you would step back just a
7 little bit, I'll hear you and you won't get that back --

8 MS. WOOD: Okay. Thank you. That's great.

9 (Steps back from microphone.)

10 MS. WOOD: So we have a department, the LERT,
11 we call it the "Law Enforcement Response Team" that
12 reports to me and every day we get subpoenas and court
13 orders from local law enforcement, federal law
14 enforcement, Homeland Security, DEA, FBI, the Secret
15 Service, and we're asked to investigate the source of
16 the activity that's being investigated by law
17 enforcement. And during the period of time that we had
18 cloned modems on our network, that was very difficult to
19 do sometimes. If I have four modems on the network, all
20 that look identical, and I basically wanted to know
21 which one is the right one, the person they're looking
22 for, um, I have no way of knowing, because they all look
23 alike. And so we would have to respond, "unable to
24 identify." I just don't have a way of distinguishing
25 it. And this happened many, many times and it made me

1 sick so often that I had to go back to law enforcement
2 and say, "Can't tell you."

3 Now, you know, how many of those folks committed
4 those crimes? You know, I don't have a way of proving
5 that every single one of those times the perpetrator was
6 using a modem built by and sold by Mr. Harris, but it's
7 been an ongoing problem for many years that was very
8 disturbing to me. And that's why when we had the
9 opportunity to come today, I asked if I could come and
10 Charter understood what an important issue it was and
11 agreed to send me here to speak.

12 (Is seated.)

13 THE COURT: All right. Thank you very much.

14 MS. WOOD: Thank you, your Honor.

15 THE COURT: All right.

16 Ms. Sedky, what, please, is the government's
17 recommendation and what are the reasons for it?

18 MS. SEDKY: Thank you, your Honor.

19 We are asking for a low-end guideline sentence of
20 70 months to be followed by 3 years of supervised
21 release, no fine, and the restitution that we discussed
22 earlier. And the reasons to support the 70 month
23 sentence is, we acknowledge that 70 months is a strong
24 sentence here, but Mr. Harris's conduct, if you look at
25 the nature and the circumstances of his offense, it was

1 a six-year prolonged crime spree that wreaked havoc on
2 ISPs like Charter who spent hundreds of hours, as you
3 can see from the letters from Motorola and Charter and
4 you might recall from the testimony of Benjamin
5 Brodfuehrer and Chris Kohler at trial, playing this
6 cat-and-mouse game, and TCNISO was a scourge to the
7 ISPs. And as easy as it is to demonize the ISPs, nobody
8 likes paying high cable bills, the bottom line is that
9 they lost millions of dollars in subscriber revenues and
10 spent hundreds of man hours, person hours, which equates
11 to money, on Ryan Harris alone.

12 This was a very prolonged six-year program.
13 Mr. Harris acted with absolute knowing malice. He had a
14 desire to punish the cable companies. He expressed that
15 desire repeatedly in his literature, in his chat logs,
16 in his book. He was the "angel" he called himself. He
17 was the father of this cottage industry of cable modem
18 hacking. He created it himself. He was the only person
19 in this state to mass market a turnkey plug-and-play
20 device that allowed people very easily to steal internet
21 service for months and years at a time. And he did so
22 with knowing malice and he was motivated by greed.

23 This was not someone who was sitting back as a
24 freedom fighter or for the internet and free speech or
25 whatever, he was in this to become a millionaire. He

1 wanted a house. He wanted a pool. He wanted money,
2 millions and millions of dollars. And he was successful
3 in wreaking havoc and in punishing these ISPs, as you
4 heard from Ms. Wood.

5 And I would submit to the Court that a 70-month
6 sentence, being at the low end of the guidelines,
7 actually gives Mr. Harris a huge discount on what his
8 guidelines calculation would be if we were lucky enough
9 to be able to calculate the loss, because I don't think
10 it is disputed that it is orders of magnitude higher
11 than his personal gain. And he is fortunate that we are
12 not able to measure because his guidelines would be
13 exponentially higher.

14 And he's getting a major discount by virtue of the
15 fact that we have agreed to view the gain as a proxy for
16 the loss, um, the loss in terms of lost subscriber
17 revenues, the loss in terms of degraded performance to
18 the other legitimate paying subscribers, and, as you
19 heard during the trial, and in the letters and
20 Ms. Wood's testimony today, legitimate paying
21 subscribers were knocked off the network. The ISPs
22 would have to invest money to keep their speeds the same
23 and many times they would have to pass these costs off
24 to their consumers to some degree. So this is not some
25 nameless, faceless victim, these were innocent,

1 legitimate paying subscribers who were ending up having
2 to essentially pay for Mr. Harris's six-year crime
3 spree.

4 And, um, in addition to this exponentially larger
5 harm to the ISPs that was shared by legitimate paying
6 subscribers, you also have to look at what exactly was
7 Mr. Harris's role in this scheme and the evidence is
8 unrefuted and Mr. Harris essentially concedes it in his
9 own guidelines calculation, he accepted a
10 leader/organizer enhancement for four points
11 acknowledging that he was the guy. He sold, admitted --
12 he, by his own estimation, has sold 15,000 of these
13 units or he had 15,000 purchasers. We had trial
14 testimony that he was trying to cut a deal for unlimited
15 licenses up to 10,000. So he was acting with not just
16 reckless abandon, but malice and greed. He declared war
17 on the cable companies repeatedly and he essentially
18 used his purchasers as his soldiers in his own war.

19 And he has shown no remorse throughout this
20 proceeding. I would like to draw the Court's attention
21 to what has been marked as Exhibit 1. A few days
22 before, I guess it was Monday, as I was preparing my
23 remarks for today, I wanted to just take a look at what
24 was going on in his website and you'll see that he has
25 turned his website into a donation tool. It says:

1 "TCNISO donate," with some Visa, PayPal, Mastercard
2 buttons, "If you have any questions, contact us. Thank
3 you for being patient."

4 Now, this strikes me as someone who is not
5 remorseful, is laying in wait, waiting to rise up again
6 and start his business as soon as he gets the go-ahead.
7 I don't know what to make of this, but it is not the
8 activity of someone who feels remorseful and that leads
9 into the deterrence argument here.

10 THE COURT: Well, this document says: "TCNISO
11 donate," it shows some credit cards, and it says, "If
12 you have any questions, contact us. Thank you for being
13 patient."

14 And what do you argue that indicates?

15 MS. SEDKY: I think this is -- this is not
16 emblematic of someone who has realized he's been
17 convicted of a crime and is remorseful and is feeling
18 like what he did was illegal and wrong. And, um, and I
19 think that that goes to -- when we're thinking about
20 deterrence, both specific deterrence and general
21 deterrence, this is a man who really has had every
22 advantage in his personal life. He came from -- unlike
23 many of the defendants we come across in our jobs as
24 prosecutors, he did not come from a gang background or a
25 drug addict background where he had many externalities

1 that were pressuring him to turn to crime, he came from
2 a stable, intact, upper middle-class home. He had
3 unbelievably marketable skills in his computer
4 background as evidenced by the fact that he's had no
5 problems finding a job in the computer industry to
6 support himself during the pendency of this criminal
7 action. And, um, given -- we see no circumstances of
8 his personal life to justify leniency beyond what has
9 already been shown by his guideline calculations
10 specifically by substituting gain as a proxy for loss
11 here.

12 And in terms of deterrence, and also in protecting
13 the public, there are -- Mr. Harris -- we have very
14 serious concerns over whether a year-and-a-day sentence
15 would have any effect on Mr. Harris's decision-making
16 going forward, but, more importantly, the industry of
17 cable-modem-hacking people are watching with bated
18 breath, they were watching the trial to see if he got
19 convicted, and they will be watching this sentence. And
20 if he has a -- what they consider to be a slap on the
21 wrist, they will think of the cost of doing business,
22 they'll do their cost-benefit analysis in their head and
23 they'll think, "What's the percentile likelihood that
24 I'm going to get caught and prosecuted successfully and
25 then what's my likely outcome if I do get prosecuted

1 successfully?" And I would submit to the Court that if
2 Mr. Harris gets a lenient sentence here, it will send a
3 terrible message to current and would-be cable-modem
4 hackers and it will expose ISPs and their legitimate
5 paying subscribers and cable modem manufacturers all
6 around the world to continued significant risk.

7 And for those reasons we believe that a 70-month
8 sentence is fair, we believe it accomplishes the 3553
9 factors, it takes into account his personal background,
10 the nature and circumstances of the offense, and it
11 would adequately deter him from his own future of
12 criminal conduct and others in his own position.

13 THE COURT: Thank you. Mr. McGinty.

14 MR. MCGINTY: Can I start with something that
15 the government just spoke about moments ago and that is
16 the prospective risk of cloned modems being used.
17 Looking at the chart or letter that was submitted to the
18 Court, I'm looking now at the --

19 THE COURT: Hold on a second. I'll get that.

20 (Pause.)

21 MR. MCGINTY: This is Page 2 of the Exhibit 2,
22 Docket 160.

23 THE COURT: Okay.

24 MR. MCGINTY: You know, on the -- in the
25 fourth paragraph it addresses "corrective capability to

1 identify cloned modems" and what it says in the third
2 line, it begins: "We were able to develop automation
3 that would successfully integrate into our billing and
4 provisioning systems so that the anticloning system
5 would automatically disable connectivity for the cloned
6 modems. The development time for this process took
7 several years. I'm proud of Charter's engineers because
8 Charter was one of the first major cable companies to
9 develop this capability. Later other companies asked if
10 we could share our code."

11 The cloned modem access to unprotected cable
12 networks is over. The technology capable of doing that
13 is -- has been defeated by detection capabilities within
14 the cable companies. So when the government talks about
15 this concern about specific deterrence to Mr. Harris,
16 whether prospectively he may want to go into this again
17 because it remains as a possibility, I respectfully
18 suggest, um, that door is closed.

19 THE COURT: The evidence at trial did indicate
20 what the government characterizes as a "cat-and-mouse
21 game" with the companies taking steps to frustrate the
22 cloning and then efforts with Ms. Lindquist and others,
23 you know, to get around that. Why wouldn't I be
24 concerned, why wouldn't one be concerned about sort of a
25 continued effort on the behalf of somebody to, you know,

1 frustrate the efforts of the cable company?

2 MR. MCGINTY: Well, the person who was, um,
3 the -- who had the capability of imagining the
4 penetration into a cloned system or into an embedded,
5 um, CPU, was Isabella Lindquist whom, um, the Court saw
6 testify here, and there's, I would think, the Court
7 would agree, that there's very little likelihood that
8 she would engage in anything like this in the future. I
9 think it's pretty clear from what we've read or from
10 what I've been able to read, um, that the capability of
11 doing this has ended because the systems are no longer
12 unguarded and what existed before and in the period of
13 2002, 2003, 2004, was frankly -- and I say this not
14 intending to spark an argument with the government, but
15 to try to put this into a larger context, but was a
16 largely unguarded access to the cable modem network.
17 Um, Motorola had a device, it relied upon a publicly-
18 available conspicuous identifier as a means of gaining
19 access. That vulnerability doesn't exist anymore.

20 Um, what, um -- what --

21 THE COURT: And you say that because -- for
22 example, the boxes of the modem had the MAC addresses on
23 them?

24 MR. MCGINTY: Correct, and that was the
25 only -- I mean, I think to use the word "security" is to

1 overstate it. If you use a publicly-available
2 identifier as your security means, you either are
3 indifferent to security, um, or you, um, don't think
4 that it's a significant problem to your system. And --

5 THE COURT: I think that they have other
6 measures, that it was necessary to get MACs from other
7 parts of the country because you couldn't have two MACs
8 in the same neighborhood, um, with the same address?

9 MR. MCGINTY: Right, but as security measures
10 go, that's a fairly modest measure. And I want to be
11 clear about what I'm going to argue here with respect to
12 this.

13 I'm not suggesting that Motorola and Charter
14 didn't notice that Mr. Harris is existing. What I do
15 want to say is that based on discovery during the course
16 of the trial what we learned is the degree to which they
17 knew he existed is reflected in e-mails or
18 correspondence and it was modest indeed. Um, there was
19 an inquiry, as part of a grand jury investigation, to
20 Ms. Wood at Charter and it was looking for information
21 with respect to, you know, what was it that you have
22 with respect to TCNISO. The response to the agent went,
23 quote: "My department had asked if it would be possible
24 for us to get information regarding how many Charter
25 modems were sold by his site or a group of people so

1 that we could calculate damages. I think he is
2 interested in claiming damages in a criminal action and
3 also possibly initiating a civil action. Is this
4 information available or should I check in later when
5 the process of negotiation with the defendant is further
6 along? Thank you very much."

7 THE COURT: That's Charter asking the
8 government?

9 MR. MCGINTY: Correct, asking the government.

10 Now, um, correspondingly, um, there was an inquiry
11 by Mr. Bookbinder, this was to Motorola, and this was
12 the one I quoted in my brief, which indicated that, um,
13 that the government had asked, you know, "What documents
14 do you have to document what it was that TCNISO was
15 doing?" And what it said is, quote, "Let's discuss next
16 week as the search for responsive documents, while not
17 being complete, does not appear to be fruitful."

18 Now, in arguing this, I'm not suggesting that they
19 weren't aware that there was a hacked modem capability
20 out there, what I am suggesting is that in terms of the
21 significance of this as a -- as a, um -- as a, um, sort
22 of threat to the cable companies or as a significant
23 looming presence that created significant security
24 concerns for the ISPs, um, these documents don't bear
25 that out. And I would note that with respect to the

1 Motorola submission, they do present e-mails and the
2 e-mails are for a period in 2004. The 2004 e-mail --

3 THE COURT: Hold on just a second. The
4 Motorola letter?

5 MR. MCGINTY: No, this is separate, this is
6 the, um -- this is not submitted as part of the
7 sentencing documents.

8 THE COURT: Is it something that I have?

9 MR. MCGINTY: Um, this is not something that
10 you have. But this was an e-mail exchange between
11 Mr. Bookbinder and a Carol Tate, um, of Motorola back in
12 2008 while the grand jury investigation is ongoing.

13 Now, if the Court recalls, um, there was some
14 issue about whether or not, um, I would seek to have
15 this admitted and also whether I would seek to have
16 admitted Charter e-mail and we didn't ultimately seek to
17 admit them because the government's position was that if
18 we put in the Charter e-mail, they would seek to put in
19 the subsequently-created claims of Charter with respect
20 to overall loss, um, and with respect to the e-mails
21 here, um, in the midst of the e-mail was a profile about
22 Mr. Harris in 2004 that described, you know, what it was
23 that TCNISO did and what the views were of the author
24 about what it was that he did, which also we didn't want
25 to have admitted.

1 The point of the e-mails, though, was that save
2 for an e-mail in 2004, which was a "Has anyone seen this
3 communication about this hacker named Harris and his
4 company called TCNISO?" um, there was no more
5 communication in e-mails in Motorola until 2006 and that
6 was in connection with the purchase of a modified modem
7 in 2006 and then a further inquiry by e-mail in 2007.
8 So in terms of the impact this had on the cable
9 companies, in terms of their perception that they were
10 expending money to increase their -- their service in
11 certain service areas, that this constituted a
12 significant impact on the cable companies, such as is
13 described here by the government, in urging a higher
14 sentence for Mr. Harris, I would respectfully submit
15 that this documentary record doesn't support that and
16 more for that matter does the testimony during the
17 course of the trial.

18 The Court heard from Mr. Brodfuehrer, for example,
19 um, during trial, he of Charter. He testified with
20 respect to, um, what steps he took to identify cloned
21 modems and what their capability was. And if your Honor
22 recalls, he said that either in 2006 or 2007, um, he had
23 tested one of the modified modems to find out what its
24 capability was, but it turned out there were no
25 documents reflecting the test, there was no

1 communication with other people with respect to what the
2 test meant, and there was no discussion about what steps
3 would be taken to try to address this issue.

4 THE COURT: This -- the gains Mr. Harris has,
5 and I agree, conservatively have been estimated to be
6 between 400,000 and a million dollars, and your argument
7 sounds something like saying, um, if somebody had a half
8 a million dollars in their house and left their door
9 open and somebody walked in and took it, or didn't put a
10 good lock on the door and somebody went in and took it,
11 um, that's not such a big deal.

12 MR. MCGINTY: Well, that's exactly the
13 argument I'm not trying to make. What I am trying to
14 make is that when the government says that the losses
15 were exponentially higher, in other words, the guideline
16 range that we've talked about here, I think they could
17 be actually calculated to be significantly higher.
18 That's simply not the case.

19 THE COURT: No.

20 MR. MCGINTY: And also in terms of the harm
21 done, in terms of the daily harm and the commitment to
22 try to rectify the problems raised by Harris's work
23 here, um, I would respectfully submit, um, don't fairly
24 capture the degree to which the cable companies were
25 largely indifferent to what was happening in this

1 sphere.

2 So in terms of the sort of the larger threat of
3 the cable companies quaking in their boots because it
4 was concerned about what Mr. Harris was capable of
5 doing, um, they knew he existed, but they didn't notice
6 that he existed, and there's a difference.

7 THE COURT: The -- I mean, I think this is a
8 meaningful point to discuss because I think the
9 government's argument is that there's a larger context
10 to this, um, and it's something almost of a generational
11 war that emerges as the picture from the trial, because
12 you've got these relatively young people, um, with
13 computer skills, who got into this because they wanted
14 faster service when they played their video games and,
15 you know, they're antagonistic to these big corporations
16 that are making money and making it either too expensive
17 or not giving them the fast service they want even if
18 they, you know, are going to pay for it. And I think,
19 you know, it's something I think about and I say it so
20 you can address it, um, with regard to the need for
21 general deterrence is, you know, is it not just this
22 specific scheme, you know, cloning modems, but, you
23 know, the whole idea that if you steal something from
24 somebody you don't see on the internet, um, that that's
25 not really a crime? Um, and perhaps there are, you

1 know, people who would never break into somebody's house
2 themselves or rob a bank, but would take just as much
3 money on the internet. And, in fact, as you cited the
4 **Watt** case or quoted it, or somebody did -- I guess the
5 government did, you know, quoted Judge Gertner, you
6 know, talking about, you know, quoting some treatise on
7 the threats -- you know, the unique threat from cyber
8 crime. And we had the testimony of Hanshaw -- and
9 Mr. Harris is certainly not going to be punished by me
10 for anything Mr. Hanshaw did, but he had those phony 911
11 hostage calls and thought it was amusing that the police
12 in Seattle would show up with a SWAT team at somebody's
13 house.

14 MR. MCGINTY: It's no small part ironic,
15 however, um, that one of the contentions the defense
16 made at trial was that this was a multicapability device
17 and one of the significant ones, that is, is that it, in
18 fact, ensured anonymity on the web. In fact, as part of
19 the evidence at trial, um, we put in that there's a
20 government-sponsored, government-created anonymity
21 capability that the government has sponsored and made
22 available to everybody, and part of the government's
23 response on the anonymity side is that there are other
24 ways to get that and you don't have to resort to using
25 Harris's product to get it, because it's generally

1 available. Now we hear that anonymity is an aggravator
2 rather than something that shows that this is a
3 multifaceted device.

4 THE COURT: It's not so much that anonymity
5 itself is an aggravator, um, if you're in China or Iran,
6 you know, anonymity can serve the cause of human
7 rights. But the idea that, you know, Mr. Harris is
8 representative of a group, I don't know how big a group,
9 of people who think that if you steal on the internet,
10 it's not unlawful or it's not comparable, you know, to
11 walking into somebody's business and stealing money out
12 of their safe.

13 MR. MCGINTY: Well, in *Watt*, um, Judge Gertner
14 confronted the contrast between a loss figure that was
15 in the billions, as in billions of dollars, and an
16 offender, um, who was a first offender, whose sense of
17 the scope and consequence from the conduct was entirely
18 disproportionate to the effect that he had, and trying
19 to reconcile those two was enormously difficult, and it
20 showed in the disposition when Judge Gertner said the
21 sentence ought to be two years, showed the difficulty of
22 trying to reconcile those two ends of the -- and I think
23 that's the same issue here. And if --

24 THE COURT: But in -- I'm sorry. Go ahead.

25 MR. MCGINTY: And if I might? A lot of the

1 fight here comes over a guideline that elevates the
2 exposure here to almost six years. Now that's an
3 extraordinary exposure.

4 I recall something that Arthur Lyman of some
5 distinction some years ago had said, that for a first
6 offender, he said, um, "It's not length of jail, it's
7 the fact of jail," and it is the social opprobrium that
8 comes with that, it's the fear of going in the door. I
9 have dealt many times with people where it wasn't the
10 length of the sentence that so frightened them -- oh,
11 sure, that was a component of it, but it was the fact
12 that they were going to be going into confinement with
13 fears that they couldn't even begin to imagine.

14 Now, in a large way we've lost sight of that
15 because we've elevated sentences now and we ask the
16 question, "Gee, is 6 years enough for a first
17 offender?" And this is a first offender here, convicted
18 by a jury, who is 28 years of age, who has not quite
19 completed his college education, shows considerable
20 intelligence, considerable capability. We'll warehouse
21 him for six years, if the government has its way, for
22 six years. We have a degradation of skills, we have a
23 job market that will spit him out, and we have a felony
24 wrapped around his neck that's going to keep him from
25 being a productive member of the community. I remember

1 some years ago, and I remember them well, that the
2 conversation was about, um, putting a person who has not
3 been convicted before in jail at all to pay the price
4 for the offense, but now the numbers have gotten so
5 extraordinary.

6 Now, what motivated Mr. Harris here --

7 THE COURT: Wait, let me stop you because,
8 one, one of the purposes of the guidelines was to treat
9 white collar robbers comparably to blue collar robbers,
10 that's a stated purpose, and they did raise the offense
11 level for white -- or the guidelines over prior
12 experience. That was deliberate and in my view, which I
13 may have expressed back in 1986, well founded.

14 Two, every case is unique. Watts didn't develop
15 the scheme that he assisted in and he wasn't paid
16 anything according to the decision, he just did it as
17 sport because of his animosity -- well, to show he could
18 do it, um, and he helped Gonzalez make a fortune. But
19 if you look at one of those early footnotes in the **Watts**
20 decision, it reminded me that I sentenced somebody else
21 in that scheme, Zane, to 46 months, because he provided
22 inside information on a bank. Every case is unique.
23 But --

24 MR. MCGINTY: Well, I'm in favor of trying to
25 provide some sort of fair parity between, um, white

1 collar offenses and non-white collar offenses. I would
2 note that if Mr. Harris robbed a bank, um, his guideline
3 would be Offense Level 20, plus 2 for it being a
4 federally-insured institution, and his guideline would
5 be lower. Um, and without a criminal record, there are
6 any number of offenses, one of which includes arson --

7 THE COURT: How would his guideline be lower?

8 MR. MCGINTY: His guideline would be lower
9 because the --

10 THE COURT: It would be 24 minus 3 --

11 MR. MCGINTY: It would be 22, plus 3, it would
12 be 19.

13 THE COURT: I thought you said the offense
14 level would be 20 plus 4 for a federally-insured --

15 MR. MCGINTY: No, it would be plus 2. It
16 would be plus 2. So it would be 22, less 3 on a plea,
17 it would be 19. The same would be true with arson.

18 THE COURT: For the same amount of money?

19 MR. MCGINTY: Um, the same amount of money?

20 THE COURT: Yeah, well, if one could see
21 whether he was the organizer of the bank robbery,
22 whether he got half a million dollars? But anyway. Go
23 ahead. All I'm saying is I haven't done the alternative
24 calculation. I'm not confident it's correct.

25 MR. MCGINTY: But while the Court is correct

1 that certainly in 1986 there was the intent to raise the
2 guideline, um, that guideline became raised over and
3 over again after that, not simply for purposes of
4 adjusting for inflationary changes, um, but sort of
5 increased willy-nilly, and so that now we have the
6 extraordinary spectacle of first offenders in white
7 collar cases looking at double-digit sentences.

8 THE COURT: I think the theory -- I'm not sure
9 it's willy-nilly, um, we've gone through, you know, um,
10 several financial crises since 1986 that have probably
11 heightened people's appreciation of the cost of white
12 collar crime and helped recognize that white-collar
13 crime almost uniquely is a crime of calculation, usually
14 generated primarily by greed, and so the sentences are
15 intended to alter the calculations.

16 MR. MCGINTY: Well, here, um, the offense
17 conduct is not originally motivated by greed. Um,
18 Mr. Harris had perceived a wrong, in his view, um, this
19 capability of ISPs to affect your speed and to affect
20 your service performance. Now, that would not be a
21 grievance that most of us would find worthy. Um,
22 certainly unlimited web speed is -- to call it a false
23 guide gives it the respect that it doesn't deserve, but
24 his motivation in doing this -- um, the government
25 refers to him as "leading a life of crime," his

1 motivation was not that. His motivation was his
2 grievance and his feeling that there had to be sort of a
3 rectification of power. And when he did that, um, he
4 didn't seek anonymity, he didn't prepare a black box and
5 sell it surreptitiously, um, he published a book,
6 identified exactly what his exploits were, and in effect
7 notifying the cable companies or the ISPs exactly what
8 their vulnerability was, um, and he sold a product,
9 which the government says was "out of the box, plug in,"
10 but, it wasn't "out of the box, plug in," as we know
11 from Mr. Medeira, who testified, um, that when he
12 plugged it in it lasted for thirty days and then there
13 would be something required for him to do and that he
14 didn't follow up and do that, and other persons have
15 tried to use it and have found it to be burdensome, um,
16 and so the result was that rather than this being an
17 easy application, it turned out to be considerably
18 different from that.

19 Now, I think that looking to see whether
20 Mr. Harris fits the marque of a person who is leading a
21 life of crime, I think the Court captured the nub of the
22 issue, um, at the time the Court had the colloquy with
23 Mr. Harris after the guilty verdict, and what the Court
24 said was that "You could be smart, but not wise," and I
25 think that captured exactly what the issue is here, um,

1 a challenge to ISPs, based on a grievance about speed,
2 elevating that to the sale of a product, was misguided,
3 it was deeply immature, it was one that now puts him in
4 a very, um, in a very, um, frightening position as he
5 contemplates what the consequence for that might be.
6 Um, I think the government can argue, but its point
7 misses, when they talk about him, his life of crime as
8 if he was motivated here initially to steal. Um, in
9 fact, he acted on a grievance as a lot of young people
10 do.

11 THE COURT: The grievance that he couldn't get
12 service as fast as he wanted it?

13 MR. MCGINTY: Right, and this proceeding, what
14 the consequences would be.

15 THE COURT: How did he misperceive the
16 consequences? The jury found that he engaged in wire
17 fraud, intentionally knowing that it was illegal, and
18 with intent to defraud, to cheat the ISPs, and he wasn't
19 just out trying to get faster service for himself, um,
20 he was creating an industry.

21 MR. MCGINTY: But in terms of evaluating --
22 accepting the jury's verdict, in terms of evaluating the
23 gravity of the offense, looking to what motivated him to
24 participate in the offense and looking to see what
25 exactly he had done to advance this offense, um, I would

1 respectfully submit to the Court that there is a -- um,
2 this is an area where, um, the lines between permissible
3 and impermissible conduct are not as clear as they are
4 in other areas. This is not an area of the law where
5 there are simple prohibitions against robbing a bank or
6 against setting a fire in a public building. Um, there
7 are many applications on the net -- and I know the
8 Court's impatient with this, but it's --

9 THE COURT: No, I'm not impatient.

10 MR. MCGINTY: -- but it's a significant point,
11 I think. What Mr. Harris did is done in other ways by
12 legitimate, um, companies on the net who have
13 distributed hacking devices, who have distributed things
14 like "stroke counters," and have done it in a way that
15 --

16 THE COURT: I'm sorry. Things like what?

17 MR. MCGINTY: "Stroke counters" that identify
18 what the key strokes are of persons who are submitting
19 information over the net. They're able to intercept
20 data that's going over the net. And these applications
21 are ones that are generally available. Um, in some
22 instances they are government sanctioned. Um, for
23 Mr. Harris to glean the line that separates his conduct
24 from those kinds of conduct -- not in terms of whether
25 the jury convicted him of the crime or not, but in terms

1 of looking at the gravity of the offense and what
2 motivated him to participate, his misperception of the
3 consequence of doing that is what got him in harm's way.

4 THE COURT: Well, it seems to me you just
5 conflated two points, and I'm not impatient with the
6 argument, although it's one I wrote about a dozen pages
7 about and issued yesterday. I regard this case as a
8 straightforward application of the wire fraud statute
9 and, you know, it's -- the law gets applied to emerging
10 technologies, but as the cases I cited yesterday, um,
11 indicate, at times people were stealing telephone
12 service and developing technology to do that and then
13 cable television service and, you know, now you have the
14 internet, so now it's internet service. But the jury
15 had to be convinced beyond a reasonable doubt that
16 Mr. Harris knew what he was doing was illegal and
17 engaged in the activity with intent to defraud, to get
18 money, to cheat the providers out of money. So -- and
19 in viewing the evidence, I feel very comfortable with
20 that conclusion. I recall, you know, various efforts
21 to, you know, make it difficult to find them. Although
22 he did write the book.

23 MR. MCGINTY: And in writing the book, it's
24 something that's unusual in terms of what his -- in
25 terms of what his culpability is. Um, it is the unusual

1 defendant who, mindful that they're committing some kind
2 of offense, does it in a way that involves sort of
3 publishing what the --

4 THE COURT: It could be a manifestation of an
5 arrogant sense of invulnerability, um, "Nobody can nail
6 the angel."

7 MR. MCGINTY: Well, I respectfully submit that
8 it's suggesting something quite different and what it
9 suggests is that when he embarked on this, um, he
10 thought there was legitimacy about his contest, and it
11 was in the challenge, it was in the contest -- not in
12 the criminality, not in the theft, that motivated him.
13 And in terms of putting in perspective what the penalty
14 would be, it is important to assess the degree to which
15 that contributed to his behavior and sentence him
16 accordingly.

17 This nuance, and it's an important one, I think,
18 separates that -- that Mr. Harris, who's a real human
19 being, in terms of facing a consequence, and the
20 government's version of him, which is a person leading a
21 life of crime in different and in basically without --
22 without any compulsion about just, you know, constant
23 stealing.

24 So, um, it is significant to look at what he did,
25 it is significant to look at what he was doing publicly

1 as an expression of what he thought he was doing, and
2 it's also significant to look at who is the victim
3 here. Um, no one is privileged to victimize a
4 corporation, but it is aggravating conduct if the fraud
5 focuses on the vulnerable, on the widows, on people who
6 don't have the means. Harris went toe to toe --
7 actually not even toe to toe, he looked up at Goliath
8 and challenged Goliath. He didn't trick the vulnerable
9 into giving him something not his.

10 The fraud guideline measures loss, it does that as
11 a -- sort of on a retribution model which says that you
12 answer for the gravity of your offense and it adds up
13 the money. That money ordinarily is a factor of
14 somebody who takes something from someone that is done
15 by deception or deceit or by cunning. Here Mr. Harris
16 announced his presence, the cable companies hardly
17 noticed that he existed, and he presented himself,
18 telling them what he was doing.

19 So the challenge here in sentencing him is the
20 same challenge that existed in **Watt**, but it's slightly
21 different. What do you do about a person whose
22 motivation toward the offense, toward the conduct, was
23 not of a sort that ordinarily characterized the offense,
24 because he didn't go after the vulnerable, he didn't go
25 after the persons who would be harmed here. And I think

1 that --

2 THE COURT: By the way you just described the
3 ISPs, they're vulnerable to being robbed because what
4 you take from them is not that important, it's not that
5 large a part of their revenues.

6 MR. MCGINTY: No, but in terms of his aside
7 with you of the conduct. Um, in jury selection, there
8 were a number of jurors who came in and said, "I've done
9 this." Um, now, that doesn't mean it's good, they
10 weren't proud of themselves, but we do recognize that
11 the gravity of the offense depends upon, um, how it's
12 viewed in a larger societal scale. Um, taking cable
13 service is not the same thing as doing harm to a person,
14 stealing their retirement. Um, there are innumerable
15 examples, and the Court's seen them, of the terrible
16 harm that's done by people who engage in deceitful
17 conduct, but this is a very different kind of case with
18 very, very different kind of victims. Yet, the
19 guideline we apply is a guideline that's based on this
20 retribution model, just desserts, if the loss is a
21 certain figure, that's where the consequence is, and
22 what it doesn't take into consideration are the things
23 that I think separate Mr. Harris from other people who
24 do this and put him into a -- sort of a very different
25 kind of evaluative process.

1 And I think -- and I'm going back to what the
2 Court has said. Um, when Mr. Harris was addressing your
3 Honor and you characterized him as "smart, but not
4 wise," his response to that was -- um, he told you he
5 was working, that he went back to Oregon and he has kept
6 that job, that he's worked as many as 80 hours a week,
7 um, and he's appeared in court here in order to show
8 that he respects and honors the trust that the Court
9 extended to him, um, that, in a sense, that it's
10 important for the Court to appreciate that in a very
11 real way he gets it and that what you said to him
12 resonated in a way that was extraordinarily meaningful.

13 THE COURT: Well, he -- I wouldn't have
14 released him pending sentencing if he hadn't obeyed the
15 conditions of his release before his conviction, that he
16 has -- and we may end up having a discussion about bail
17 before we go home today. Um, but again I say this to be
18 as transparent as possible. I'm not confident that
19 Mr. Harris gets it. And I -- right after I told him he
20 might be smart, but he wasn't wise, he told me he wasn't
21 a good swimmer, that he couldn't swim to Hong Kong. Um,
22 that didn't sound terribly contrite.

23 MR. MCGINTY: A weak attempt at humor under
24 difficult circumstances.

25 But what he's done is he's gone back to his home.

1 He has largely lived there. He works from his home.

2 Um, what I have learned about Mr. Harris is he doesn't
3 leave his home and that what he does is he largely
4 functions around his work and about and around sort of
5 contemplating what's going to come up and what steps he
6 has to take to significantly change his life.

7 So my point in its entirety is this. I think that
8 70 months is a sentence that holds no, um, for general
9 deterrence purposes, um, it has the effect of imposing a
10 sentence out of proportion to what's necessary for this
11 court to create a consequence for engaging in criminal
12 conduct. For specific deterrence, there's not a hint
13 here that Mr. Harris, while he's been on supervision,
14 um, is contemplating engaging in this type of conduct
15 again. He has renounced any business ownership or any
16 attempt to be involved in a business. Um, he's employed
17 as a wage worker now.

18 So under all these circumstances I ask the Court
19 to consider the sentence that I recommended, the year
20 and a day. Um, I think it fairly responds to the
21 gravity of the offense, it values who he is as an
22 offender with characteristics different from other
23 offenders in similar circumstances.

24 THE COURT: So if I were to sentence him to a
25 year and a day, that would make him eligible for good-

1 time credits and if, as I expect, he performed well in
2 prison, he would serve about 10 1/2 months?

3 MR. MCGINTY: That's right, and he would then
4 be under house arrest for an extended period, um,
5 earning money and paying back --

6 THE COURT: I'm sorry. Are you recommending
7 that home detention is a feature of supervised release?

8 MR. MCGINTY: Oh, yes.

9 THE COURT: How long?

10 MR. MCGINTY: We recommended, I think, two
11 years. And the point of that was to have a meaningful
12 period of house arrest with him employed and being able
13 to pay back the restitution.

14 THE COURT: And the government shows me this
15 printout from the TCNISO page, they say of Monday. It
16 says: "If you have any questions, contact us. Thank
17 you for being patient." And I think the government's
18 argument is this is Mr. Harris saying, "Be patient, I'll
19 be back in business sooner or later." How do you think
20 this should be interpreted and what weight if any should
21 be given to it?

22 MR. MCGINTY: I don't think any weight should
23 be given to it. The website has been -- the TCNISO
24 website has been removed. Um, you know, for TCNISO to
25 breathe again, it would be immediately recognized by the

1 government.

2 The hacked cable modem, um, opportunity has passed
3 and there's nothing TCNISO can do about that, nothing
4 they can even try to do about that. So, I mean, you
5 know, if the government suggests that there's a future
6 prospect of hacked modem work and that TCNISO is going
7 to again take the forefront in that, I frankly think
8 that's fiction.

9 THE COURT: Thank you, very much.

10 (Pause.)

11 THE COURT: All right. Mr. Harris, you now
12 have an opportunity but not an obligation to speak
13 before I decide what sentence to impose. That means you
14 do not have to say anything. But if there's something
15 you'd like to say for me to consider, now is the time.

16 THE DEFENDANT: Um, first, your Honor, I would
17 like to thank you for the last time we spoke. Um,
18 you've given to me a lot of trust and, um, I do
19 understand my responsibility. I was scared then. I'm
20 still scared now.

21 Um, when I was first indicted, three or some years
22 ago, the original indictment, they didn't tell me much.
23 I read the indictment and they released me with no
24 conditions other than to perform pretrial and, um --
25 follow the standard pretrial conditions, of course. Um,

1 they didn't mention anything about the alleged
2 business. They didn't mention anything, um, at all.

3 Um, I went home and the very first thing I did,
4 you know, this is the day, um, is I took down my domain
5 and the screen shot you have, that's exactly the way it
6 looked on that very day. It was my entire website, not
7 just what they alleged, but other links, I had other
8 projects, other things that were also on there, every
9 one of them went to that page you see, your Honor. So I
10 know you asked about it, um, that I would clarify it.
11 And I'm sure the government knows that as well. It's
12 been the same ever since. Um, the computer was on, it
13 was paid in full, um, several years running, um, I have
14 canceled it, the whole domain, so eventually it will
15 disappear.

16 Um, the last time we spoke, I, um -- I got and
17 went to the airport as soon as I could, booked the first
18 flight to Portland, Oregon with my wife and we went to
19 see Nick Gennari at Pretrial Services, um, and talked to
20 him about the new release conditions and, um, picked up
21 the monitor and went directly to home. And every day
22 since then I have been just working, um, at my job and
23 in my spare time, um, I work on my garden, a vegetable
24 garden that I do. I also do yard work, you know,
25 flowers, planting.

1 Um, several years ago, um, I was given an
2 opportunity to be employed by a reputable company
3 utilizing my skills and even though I've been told it's
4 a very hard job market and my employer does know about
5 my illegal situations, they have been following me up on
6 their own, um, but they still want me -- to have me on
7 their payroll and to be productive for them, and I have
8 been trying over and beyond -- above and beyond what I
9 think they originally expected of me. Um, and if --
10 they didn't just give me an opportunity or a job, they
11 also gave me a career, and I'd like to continue that
12 career.

13 Um, there was something, um, I read a while back
14 from a Nobel Lauriat when he said: "For I, being poor,
15 have only my dreams. I spread my dreams under your
16 feet. Tread softly because you tread on my dreams." So
17 I would like to summarize that as what I'm saying to
18 you. Thank you.

19 Also I would like to add, um, that if you have any
20 questions of me, that I'd be happy to answer them for
21 you.

22 THE COURT: I don't think so. Thank you.

23 (Pause.)

24 THE COURT: Mr. Harris, please stand.

25 (Defendant stands.)

1 THE COURT: In connection with the seven
2 counts to which you've pled guilty, I hereby sentence
3 you to serve 3 years, 36 months, in the custody of the
4 Attorney General of the United States, to be followed by
5 36 months of supervised release on the standard
6 conditions and the additional conditions that you not
7 possess a firearm or other dangerous weapon, that you
8 pay restitution in the amount of \$152,370 on a schedule
9 to be dictated or recommended to me by Probation, that
10 you pay a \$50,000 fine, and a \$700 special assessment.
11 The restitution will go to Charter. You may not incur
12 any new credit charges or open any additional lines of
13 credit without the approval of the Probation Office and
14 you must provide the Probation Office access to any
15 requested financial information.

16 You have a right to appeal this sentence within 10
17 days of the entry of judgment. If you cannot afford a
18 lawyer and would like to appeal, one will continue to be
19 appointed to represent you at public expense.

20 I feel I have tread very softly on your dreams.
21 While Mr. McGinty was ardent today, as he often is, um,
22 I'm sentencing you, and I have given you a sentence
23 that's several years less than the sentence I was
24 inclined to give you when we started. But for the
25 reasons I'll explain, I believe this sentence is the

1 sentence that's sufficient and no more than necessary to
2 serve the purpose of sentencing. If that proves to be a
3 miscalculation on my part and you commit any crimes
4 while you're out on supervised release, you'll be back
5 in front of me, I can lock you up for another three
6 years, and then you'll be prosecuted for those crimes.
7 But I am obligated to consider the nature and
8 circumstances of the offense and the history and
9 characteristics of you, the defendant.

10 I agree with the government, I think you committed
11 a very serious crime. Most people of any age would
12 understand that if you went into somebody's home or
13 business and stole a half a million dollars or \$900,000,
14 that's a serious crime, and you are certainly smart
15 enough to know -- more than smart enough to know that
16 that's what you were doing with regard to the ISPs.

17 And it's serious with regard to what you did and
18 it's serious to what it can lead to. I'm not punishing
19 you for anything that Mr. Hanshaw did, but I did get the
20 impression -- I'm sort of an old man listening to this
21 case, that there may be a generation of people who don't
22 know the difference between real life and a video game,
23 they consider it some kind of entertaining sport to
24 steal on the internet or to victimize people on the
25 internet in a way that they would never do face to face

1 and that's something that goes into this sentence.

2 You know, you -- you know, you're an intelligent
3 person, you don't drink, you don't use drugs, um, you
4 could make rational decisions and you were capable of
5 making rational decisions when you engaged in the
6 conduct that you knew was criminal. The jury found that
7 beyond a reasonable doubt. I would certainly find the
8 same thing beyond a reasonable doubt. You knew what you
9 were doing is criminal and you did it and you enjoyed
10 the sport with outsmarting the internet service
11 providers and it didn't just victimize them, but people
12 whose MAC addresses were cloned, they probably had to be
13 replaced, and people who weren't getting the service
14 they paid for because of what you had uncapped, I mean,
15 there are real human victims as well as the service
16 providers.

17 I originally thought I would give you a longer
18 sentence because I did not think -- I hadn't seen
19 anything that indicated to me that you got the message
20 and that you weren't going to do this again as soon as
21 you got out or soon after, but I find now that you have
22 thought about this, you have taken this seriously. It's
23 just hard for a judge to know when a well-advised
24 defendant doesn't testify, you know, you get a feeling
25 in the trial for the person, but it doesn't mean it was

1 the wrong thing to do, but that's for sentencing. But I
2 also have to send a message to other people and the
3 message that I hope that three years will be sufficient
4 to send is that it's not just wrong, it's dumb to steal
5 on the internet, that it's not -- that this is life,
6 it's not a video game, it has consequences.

7 I'm actually -- while I think there's no doubt
8 that you knew what you were doing was unlawful, I've
9 also been somewhat influenced by the fact that this is
10 one of the first, if not the first, case of this kind
11 and you didn't have the opportunity to hear internet
12 chatter that some video gamer got sentenced to three
13 years in federal court in Boston. So whoever's next,
14 um, won't have the kind of argument that Mr. McGinty
15 made on your behalf. But I do have a duty to diminish
16 unwarranted disparity. Every defendant is unique.
17 Every case is unique. There's a material difference
18 between you and Mr. Phillips. Mr. Phillips, you know,
19 pled guilty, cooperated with the government, um,
20 testified based on that letter immunity. It's customary
21 that people who do that get much lower sentences. But
22 you do get, from me, some benefit for being the first or
23 one of the first.

24 But three years is a long time and you're going to
25 be separated from your wife, and unless she's got a

1 driver's license since the last time I saw you, um,
2 she's not only going to miss you, it's going to be a
3 hardship for her, and in those three years I expect
4 you're going to think about how you feel today and make
5 a decision about how you're going to behave when you get
6 out, and it's going to be up to you. Either you're
7 going to remember how scared you were today and I expect
8 how much you don't enjoy being in prison, um, or you'll
9 get out and resume what you did before. But one of the
10 things this case should teach you is -- and you may be
11 smart, I think you're smart, but that it's possible to
12 be smart and not wise. And what you should understand
13 and everybody you communicate with should be told is
14 that it's really dumb to think that you're not going to
15 get caught, you're not going to get prosecuted, you're
16 not going to get seriously punished. I think that the
17 sentence I've given you is minimally sufficient to
18 deliver that message to you and I hope to others.

19 I've imposed a \$50,000 fine. That's actually
20 something of an expression of confidence in you because
21 I think that you've got the potential to make some money
22 honestly. If you make that money, you're going to have
23 to not just pay Charter, um, but pay that fine, because
24 I think you acted from a mixture of motives and one was
25 clearly against the internet service providers and the

1 other was the desire to make money, although, as I
2 recall, you thought a \$170,000 house was an expensive
3 house. You'll find, when you get out, \$170,000 doesn't
4 buy as much as you think it does, at least around here.
5 But your crime was in part a crime of calculation, that
6 this was a good way to make money, and I think a
7 monetary penalty is an appropriate part of it.

8 So those are the reasons for the sentence. I
9 don't regard the government's recommendation of 70
10 months as at all unreasonable. I seriously considered
11 it. I certainly think 5 years would have been well
12 within the range of reason. But my obligation is to
13 give the sentence that I find is sufficient and no more
14 than necessary and because this is apparently about the
15 first case of its kind, I think, for you, the 3 years is
16 the most appropriate sentence.

17 But for your sake, um, I hope that you don't have
18 to see me again because Probation's moved to revoke your
19 supervised release. If that occurs, I'll vividly
20 remember that I gave you a sentence below the guideline
21 range, the sentencing manual tells me I should take that
22 into account in deciding what the sentence is the next
23 time, and you and Mr. McGinty may not be as successful
24 next time.

25 So I'm sure, as you stand here today, you're

1 determined not to get into legal trouble again. I hope
2 for your sake you sustain that commitment.

3 You may be seated.

4 (Defendant is seated.)

5 THE COURT: Now the defendant has been
6 sentenced and ordinarily, absent certain prudent
7 circumstances, the defendant is detained pending
8 possible appeal.

9 What's the government's position with regard to
10 bail?

11 MS. SEDKY: Your Honor, the government asks
12 that Mr. Harris be remanded to custody at this point.
13 We raised the same arguments after his conviction
14 pending his sentence and we think that the risk of
15 flight is even higher now that he has had his post-trial
16 motions denied and the sentence imposed.

17 I think he has his -- the PSR indicates that he
18 has property that he owns free and clear in Hong Kong,
19 real property. Our own investigation showed -- we
20 didn't get that evidence in the trial, but he made
21 significant cash transfers to Hong Kong during the
22 pendency of his criminal conduct. So he clearly has
23 means and assets. In Hong Kong his wife is a Hong Kong
24 resident.

25 We think that this is a very different

1 cost/benefit analysis than it was three months ago when
2 he wasn't sure whether he was going to get sentenced at
3 all.

4 THE COURT: All right. Well, this is an issue
5 that arises under Section 3143(b). I discussed the
6 standards in yet another **DiMasi** decision last year, 817
7 F. Supp. 2d 2 at 9: "To be released the defendant must
8 show by clear and convincing evidence he'll not flee or
9 be dangerous and the defendant must prove that an appeal
10 will involve a substantial question of law or fact
11 likely to result in reversal or a new trial and a lower
12 sentence. And a substantial question is a close
13 question. I don't have to be persuaded I'm wrong, just
14 that there's some important material issue that
15 reasonable judges could decide differently. I could go
16 either way and it would not be a harmless error. If
17 it's a legal issue, um, preserved errors in jury
18 instructions are analyzed one way and those not
19 preserved are analyzed under the plain error doctrine."

20 Mr. McGinty, what is your position with regard to
21 detention pending appeal?

22 MR. MCGINTY: Well, your Honor, there's two
23 components, there's the ordinary request that he be
24 permitted to self report and then there's the second one
25 which was whether he would remain out pending the

1 appeal.

2 Um, with respect to the latter --

3 THE COURT: And, actually, let me jump ahead.
4 What I might do in this case, subject to hearing from
5 the government, is if I order him detained pending
6 appeal, I would give him a date to self report, and I
7 would probably stay the decision, so if you wanted to,
8 you could go to the Court of Appeals. That's one of the
9 -- I did that with Mr. DiMasi and I might do the same
10 thing here. So it's one of the options which preserves
11 the self-reporting option. But go ahead.

12 MR. MCGINTY: When Mr. Harris came here today,
13 um, he was fully mindful, I had spoken to him about
14 this, that he faces sentencing and that his freedom
15 could be revoked at the conclusion of the hearing. I
16 told him that the government would likely move for
17 that. I didn't want him to be surprised. So under the
18 circumstances, he was aware that coming here today was,
19 in effect, potentially surrendering himself. The best
20 measure of whether or not he is a flight risk is not
21 only the period that the Court entrusted him, which was
22 the period up until today, but also that today he came
23 and faced those consequences.

24 Um, here we have, over the course of this case,
25 tried to raise a number of issues which, um, the Court

1 differed with, ruled against us on a significant number
2 of those, but on occasion the Court did rule in our
3 favor, for example, with respect to the conspiracy
4 charge. Um, we view the case as being, as the Court
5 said just a short time ago, as being a novel case
6 raising issues that were consequential and --

7 THE COURT: And I actually -- I want to be
8 clear about that. I don't think the legal issues that
9 this case went to the jury on were novel, that most of
10 the legal issues relating to the conspiracy charge -- I
11 granted the motion for acquittal, and as I said in the
12 order I issued yesterday, I believe this case involves a
13 straightforward application of well-established
14 jurisprudence concerning wire fraud. And when I gave
15 the instructions, the only -- and I reviewed the draft
16 of the transcript to refresh my memory. When I
17 instructed on the 29th, you thought I had failed to
18 mention cooperating witnesses in my immunized witness
19 instruction, I think I did, but I repeated it, and then
20 when the jury asked me to instruct them again on wire
21 fraud the next day, you said that you thought I hadn't,
22 on the 29th, said to the jury that a person "may be
23 found" -- something to this effect, you know, "may be
24 found to intend the natural and probable consequences of
25 his deliberate conduct." I had told them that the day

1 before. Those are the only two objections that we --
2 that, as I understand it, the First Circuit would regard
3 as preserved and not subject to plain error analysis.

4 MR. MCGINTY: But there's also the separate
5 issue of the -- what we call the **Sabinski** issue. In
6 **Sabinski** the First Circuit had expressed quite clearly,
7 um, that wire fraud, mail fraud is an elastic charge
8 that does have boundaries, that prosecutors use it as
9 sort of a plenary charge. But there are due process
10 boundaries on the limits of what, um -- of what --

11 THE COURT: Is **Sabinski** a case you've cited
12 before?

13 MR. MCGINTY: We've cited it a number of
14 times. In fact, I put it on a headnote of a motion to
15 dismiss, I captioned it above the motion to dismiss.
16 And **Sabinski** related to an IRS worker --

17 THE COURT: I'm sorry. What?

18 MR. MCGINTY: He was an Internal Revenue
19 Service --

20 THE COURT: Here, hold on just a second. Let
21 me get it.

22 (Pause.)

23 THE COURT: Go ahead.

24 MR. MCGINTY: **Sabinski** was an IRS worker who
25 had accessed without authorization, um, numerous files

1 relating to persons who had filed their returns. Um, he
2 was charged with both computer fraud and also with wire
3 fraud. His conviction was reversed by the First Circuit
4 expressing a concern about how wire fraud is used in --
5 by the prosecutors to embrace conduct that ought not be
6 within its boundaries.

7 Now, **Sabinski**, is, I think, a sort of a Clarion
8 call that there are boundaries and that wire fraud does
9 exist within constraints and our whole argument here has
10 been from the start that if a person generates an
11 application, um, the manner of use by another person of
12 that application is not the stuff of a wire fraud
13 conviction. We've raised a notice issue, we've raised
14 it by, in a motion to dismiss, we've raised it again in
15 the motion for a new trial after trial, raising this
16 notice issue that Mr. Harris would be fairly apprised of
17 this conduct given what amounted to a long list of civil
18 cases where even there applications by third parties
19 don't raise issues of civil liability, let alone
20 criminal liability.

21 That issue, in our view -- and the Court doesn't
22 view this as a consequential issue, but in our humble
23 view, it's --

24 THE COURT: Oh, I know it's consequential, the
25 question is whether it's a close question. I know

1 you're not trying to get me to confess that I made
2 errors as recently as yesterday, but just to cause me to
3 believe that reasonable judges might disagree.

4 Go ahead.

5 MR. MCGINTY: And just as this is a new type
6 of prosecution, the Court's view is that this is sort of
7 garden-variety wire fraud, um, under different facts,
8 um, our view is the facts matter and a notice to
9 Mr. Harris about whether or not his conduct was unlawful
10 is a matter of constitutional notice significance.

11 So that is among the issues that we've raised.
12 The Court rather clearly, um, disagrees. It is a
13 daunting prospect to go before a judge and say that "I
14 would like you to make a finding and you're likely to be
15 the first," um, and I understand that maybe that's
16 rather a tough proposition to put to a trial judge, but,
17 um, this is a case that, um, I would respectfully
18 submit, merits, before he pays the penal consequence,
19 merits consideration by the Court of Appeals first.
20 And, you know, under those circumstances where he has so
21 earnestly attempted to convey to the Court his intent to
22 abide by the conditions set by this court, um, I would
23 respectfully request that the Court consider, um, that
24 stay so it can be --

25 THE COURT: Well, I'm inclined to find that

1 there's clear and convincing evidence he's not going to
2 flee or be a danger. And as I said, as I wrote in
3 **DiMasi**, relying primarily on the First Circuit decision
4 in **Bako**, that you don't have to persuade me that I think
5 I'm going to be reversed, you have to persuade me that
6 reasonable people might differ. But as I wrote in the
7 order I issued yesterday, there were many cases
8 involving other technologies where people were convicted
9 under the wire fraud statute going back, I think, to the
10 1960s with telephones and then with cable scramblers.
11 And the other thing that's important, in my conception,
12 is the jury instructions. The jury was instructed that
13 it had to find beyond reasonable doubt that, among other
14 things, Mr. Harris knew that his conduct was unlawful,
15 and I'm very comfortable with the -- you know, both the
16 quantity and the credibility of the evidence from which
17 the jury could have made that finding.

18 So that's what makes the vagueness argument
19 challenging for you at this point.

20 Does the government want to be heard?

21 I'm sorry. Do you want to say some more?

22 MR. MCGINTY: I -- what I was going to say is
23 that unlawful -- um, something can be unlawful civilly,
24 it can be unlawful criminally. Um, the Court's finding
25 with respect to whether something -- whether he knew

1 something could engender some kind of civil response
2 from the aggrieved party filing the complaint is
3 different from whether he knew it to be criminal. And
4 here, um, I would respectfully submit that all of the
5 plugs -- all of the single application devices, um, that
6 were the predicates for convictions in the cases the
7 Court refers to are not relevant to this, which is a
8 multiple use application where the person using the item
9 makes a choice, an election about how it's going to be
10 used, and I respectfully submit that that's a
11 significant difference that differentiates this case
12 from each of those.

13 THE COURT: Does the government want to be
14 heard on this?

15 MR. BOOKBINDER: Very briefly, your Honor.
16 I'll address this since I've dealt with this issue I
17 think more than Ms. Sedky in the past, and we have an
18 easier job here, um, trying to persuade you that you
19 were right yesterday. But I think it is exactly as you
20 described, which is that to the extent there were tricky
21 legal issues in this case, they were surrounded in a
22 conspiracy charge and while we didn't agree with the
23 decision at the time, um, it certainly simplified
24 matters here, that you were denying that charge, and
25 therefore all we have to deal with is wire fraud, which

1 is a fairly straightforward application of the statute.

2 And, you know, Mr. McGinty can suggest that this
3 was a multi-use product and that makes it different from
4 many other cases the Court cited or the government
5 mentioned earlier involving other technologies. Um, he
6 can argue that, but I'd suggest the evidence simply
7 didn't support it. The evidence was that this product
8 -- the products Mr. Harris sold had one purpose, it was
9 to help someone steal cable internet access. And in
10 light of what the evidence was and the simpler law that
11 applies to wire fraud, well, obviously they're entitled
12 to pursue any issue they'd like on appeal, um, but I
13 would suggest it certainly doesn't rise to the level of
14 an issue that requires release pending appeal.

15 Finally, since this case was not extremely long,
16 it is certainly long enough, and this is not a situation
17 where the sentence is going to be served even before the
18 appeal is decided in this case. So I'd ask the Court to
19 deny the request for release pending appeal.

20 THE COURT: Well, I'm going to take a break.
21 I want to think about this a little further.

22 Mr. Harris, you're not to leave that seat. Okay?

23 THE DEFENDANT: Okay.

24 THE COURT: The Court is in recess.

25 (Recess, 3:45 p.m.)

1 (Resumed, 4:00 p.m.)

2 THE COURT: For the reasons I'll describe, the
3 defendant's request to be released pending appeal under
4 Section 3143(b) is denied, however I am going to stay
5 the decision until the day after Labor Day, which I
6 believe is September 4, to permit the defendant to seek
7 a stay from the First Circuit, if he wants, or to report
8 to the institution designated by the Attorney General of
9 the United States if he decides on reflection that he'd
10 like to get this over with.

11 The standards, as I said, I had occasion to write
12 about last year in ***United States vs. DiMasi***, 817 F.
13 Supp. 2d 9. "First, the defendant must show by clear
14 and convincing evidence that he will not flee or pose a
15 danger to the community if he's released pending
16 appeal. If he does that, he must also prove that the
17 appeal raises a substantial question of law or fact
18 likely to result in a reversal, a new trial, or a lower
19 sentence. And a substantial question is a close
20 question, a question that could go either way, a
21 question that reasonable judges might differ on. If
22 there is that required close question, it has to be
23 about a matter that wouldn't, in effect, constitute
24 harmless error, it has to be an error of the sort that
25 would entitle the defendant to some relief."

1 Perhaps, although I don't think this is decisive,
2 but with regard to alleged errors of law in the jury
3 instructions, the First Circuit has held that preserved
4 claims of instructional error are reviewed under a
5 two-tiered standard. It considers de novo whether an
6 instruction embodied an error of law, but it reviews for
7 abuse of discretion whether the instructions adequately
8 explained the law or whether they tended to confuse or
9 mislead the jury on the controlling issue. If an error
10 was made in a jury instruction, it is generally subject
11 to harmless error review.

12 With regard to this idea of plain error, the First
13 Circuit, in cases like **Meadows**, 571 F.3d 131 at 136, has
14 said that: "To preserve an objection to a jury
15 instruction under Rule 30(d) a litigant must lodge a
16 specific objection and state the grounds for the
17 objection after the Court has charged the jury and
18 before the jury begins deliberations. Objections
19 registered during precharge hearings are insufficient to
20 preserve the issue. We review such unpreserved jury
21 instruction claims for plain error review."

22 After the jury instructions were given for the
23 first time, on February 29, the defendant only objected
24 to the government's instruction regarding cooperating
25 witnesses being under, I think, the misimpression that I

1 hadn't embraced them in my instruction on immunized
2 witnesses and I believe I repeated what the defendant
3 wanted. But in any event, that was one objection.

4 I instructed the jury on wire fraud again on March
5 1st. I repeated virtually verbatim what I had said the
6 day before. The defendant had one objection on March 1
7 to the instruction that said, in effect, that a person
8 may be found to intend the natural and probable
9 consequences of something he did deliberately. That was
10 the same language I used on February 29th.

11 I'm satisfied, by clear and convincing evidence,
12 that Mr. Harris will not -- is not likely to flee or be
13 a danger to the community if he's released. I -- it was
14 a close question as to whether to release him after his
15 conviction. I was promised that he would immediately
16 return to Oregon, that he would obey the conditions of
17 his electronic monitoring, that he wouldn't engage in
18 any more crimes, and he's done all that and he did come
19 here today and, I find, recognizing the substantial
20 likelihood he would be sentenced to prison and the real
21 risk that he'd be locked up today, and he came. So I'm
22 satisfied with regard to the first prong.

23 The defendant has not satisfied the requirement
24 that any appeal will present a close question. There
25 was a lot of discussion about legal issues before and

1 during the case, but most of them related to the
2 conspiracy count which I dismissed on the defendant's
3 motion for a judgment of acquittal. All that remained
4 were the wire fraud counts. The defendant was convicted
5 on seven of the eight.

6 The issue that the defendant characterized as a
7 "close question" here today is the question of whether
8 the wire fraud statute was unconstitutionally vague and
9 deprived him of the fair notice as applied to the
10 particular facts of this case. I addressed this
11 contention in one of the two orders I issued yesterday,
12 June 26th, 2012, and it's docket number 161. As I wrote
13 in that order: "The wire fraud claims in this case
14 involve a straightforward application of the wire fraud
15 statute to relatively new technology. However, going
16 back at least to 1967, the wire fraud and mail fraud
17 statutes have been applied to schemes that employed
18 technology to steal telephone service and cable
19 service."

20 Applying those statutes -- in this case the wire
21 fraud statute, to schemes to deprive Internet service
22 providers of revenue is an obvious logical next step.
23 Significantly I instructed the jury that it had to find
24 beyond a reasonable doubt that the defendant acted
25 knowingly, meaning intentionally, willfully, meaning

1 that he knew his conduct was unlawful, and with intent
2 to defraud, in order to convict and the jury did convict
3 on seven counts and returned a discerning verdict
4 acquitting him on the eighth, which I have expressed
5 some reservations about. The evidence was far more than
6 is sufficient to prove knowing, willful, and intent to
7 defraud. I not only defer to the jury's verdict, I
8 fully agree with it both in the assessment of
9 credibility and with regard to the sufficiency of the
10 evidence.

11 I did, during the break, read **Sabinski** again, 106
12 F.3d 1069. I recognize that there are some limits to
13 the wire fraud statute. There are limits that are
14 rooted in the terms of the statute. In **Sabinski**, the
15 First Circuit held that merely accessing confidential
16 information did not deprive the Internal Revenue Service
17 of property as required to prove wire fraud. The First
18 Circuit, at Page 1074, said that: "Binding precedents
19 and good sense support the conclusion that to deprive a
20 person of their intangible property interest" -- here
21 about confidential information, "either some articulable
22 harm must befall the holder of the information as a
23 result of the defendant's activities or some gainful use
24 must be intended by the person accessing the
25 information, whether or not this use is profitable in

1 the economic sense."

2 The defects in **Sabinski** don't exist in this case.
3 The government proved both articulable harm to the
4 internet service providers -- they lost revenue, people
5 stole service that they otherwise would have been
6 required to pay for, and the government also proved a
7 benefit to the defendant, an economic benefit, he made
8 money, hundreds of thousands of dollars.

9 So **Sabinski**, in my mind, is distinguishable on its
10 facts and in applying established jurisprudence I don't
11 perceive a competitive void-for-vagueness argument.
12 However, since I find, by clear and convincing evidence,
13 that the defendant is not likely to flee or commit other
14 crimes if he's released, I think it's prudent and
15 appropriate to stay the order that he be detained
16 pending appeal to give Mr. Harris and his counsel an
17 opportunity to reflect on all of this and decide whether
18 they would like to promptly appeal this decision denying
19 bail pending appeal, and to give the First Circuit time
20 to decide it.

21 I am ordering that Mr. Harris return to Oregon no
22 later than tomorrow and that Pretrial Services be
23 informed and inform me no later than Friday that he's
24 back at his home on electronic monitoring. I'm
25 continuing the release on the same conditions.

1 Basically I want to know no later than say 11:00, 12:00
2 on Friday, the 29th, that he's back on electronic
3 monitoring.

4 PRETRIAL SERVICES OFFICER: Yes, your Honor.

5 THE COURT: I'm ordering that Mr. Harris
6 report to the institution designated by the Attorney
7 General of the United States by 12:00 on September 4,
8 2012, the day after Labor Day, unless the First Circuit
9 has decided that he's entitled to a stay pending
10 appeal. If for some reason the First Circuit hasn't
11 decided the matter, Mr. Harris can come back to me and I
12 may grant an extension. In other words, I have
13 sufficient confidence that my ruling is correct, but I
14 don't want to preempt an opportunity for it to be
15 reviewed in the circumstances.

16 All right. Mr. Harris, are you going to go home
17 and report to the institution designated by the Attorney
18 General on September 4 if the First Circuit or I don't
19 give you more time? Are you going to do that?

20 THE DEFENDANT: Yes, your Honor, I will. I
21 promise.

22 THE COURT: All right. Once again I'm relying
23 on you being wise this time because if there's any
24 problem whatsoever, I'm going to issue a warrant for
25 your arrest, they'll find you --

1 THE DEFENDANT: Your trust is well placed,
2 your Honor.

3 THE COURT: All right. Anything further for
4 today?

5 MR. BOOKBINDER: Your Honor, just a matter of
6 housekeeping. In the indictment there is a forfeiture
7 allegation in this case. Obviously we're not pursuing
8 that at this point. We did some investigation and there
9 wasn't any asset worth forfeiting. So that isn't
10 something we're pursuing.

11 THE COURT: All right. So should I dismiss
12 the request for forfeiture?

13 MR. BOOKBINDER: Yes, your Honor.

14 THE COURT: It is dismissed.

15 Mr. McGinty, anything further?

16 MR. MCGINTY: No, your Honor. Thank you.

17 THE COURT: All right. The Court is in
18 recess.

19 (Ends, 4:15 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Chief Judge Mark L. Wolf, on Wednesday, June 27, 2012, to the best of my skill and ability.

/s/ Richard H. Romanow 11-07-12

RICHARD H. ROMANOW Date